No. 4414

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LINEKER, et al.,

Appellants,

vs.

MARSHALL, et al.,

Appellees.

APPELLANTS' PETITION FOR A REHEARING.

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To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The petition of plaintiffs and appellants respectfully shows, that they are aggrieved by the decision hereinbefore made on the 3rd day of August, 1925, and they pray that a rehearing of said cause be granted, and that upon said rehearing the decree of the District Court be reversed and a trial be ordered upon the merits.

GROUND FOR A REHEARING.

For cause for said rehearing, plaintiffs and appellants respectfully show that in reaching the deci-

sion herein, the Honorable Court has overlooked essential allegations of fact in plaintiffs' amended complaint herein, which entirely distinguish and differentiate this cause from the matters adjudicated in Action No. 5344, determined by the District Court to be *res adjudicata* herein.

Stating the matter most succinctly: Action No. 5344 was an attack upon a promissory note. The action at bar is an attack upon the trust deed purported to have been given to secure said note; Action No. 5344 was an attempt to determine by an accounting that the note was paid, the action herein is to determine among other things that the trust deed was fraudulent and void.

Action No. 5344 was the only action referred to in the decision of the District Court and we take it was the only basis for the decision of *res adjudicata* reached in that court. Certainly, it is the only action to which Lineker has been a party, and consequently it is the only one to which we will direct attention.

ESSENTIAL FACTS DISTINGUISHING CASE AT BAR FROM CASE NO. 5344, ON WHICH DECISION RES ADJUDICATA IS BASED.

The latter portion of paragraph thirteen of plaintiff's amended bill of complaint herein, is as follows:

> "That on said 2nd day of September, 1914, and without any real consideration whatever

> passing from the said R. McColgan or Daniel A. McColgan to the plaintiffs herein or to said R. S. Marshall, the said R. S. Marshall and his wife, Olive H. Marshall, wrongfully and unlawfully, and in fraud of the plaintiff's rights herein, made or attempted to make a certain Deed of Trust to the defendants R. McColgan and Eustace Cullinan, as trustees for the defendant Daniel A. McColgan, for the sum of two thousand four hundred and forty-five dollars ($2445.00), or thereabouts."

The said allegation is set forth in brief for appellant filed herein, at page nine.

In case No. 5344 the issues briefly were as follows: Plaintiff Lineker sought an accounting, and sought to have it adjudged that upon said account there was more than two thousand four hundred forty-five dollars ($2445.00) in defendant McColgan's hands to pay the note for said amount, and the prayer that sale under a trust deed given by R. S. Marshall to secure said note, be enjoined. The accounting was denied; the injunction was denied; and the Court decreed that the note for two thousand four hundred forty-five dollars ($2445.00) was given in settlement of accounts between Lineker and McColgan.

The injunction prayed against the sale under the trust deed was only incidental and would necessarily have followed from a determination that no debt existed. But the trust deed was not attacked, nor its validity determined. The determination

that there was a debt in nowise determines that there was a valid trust deed securing the debt.

Considering these matters in relation to the allegations of plaintiffs' amended bill of complaint, hereinabove quoted, it is readily apparent that the action herein is to avoid a trust deed on the ground that it was given and received in fraud. No issue of this nature whatever was made in Action No. 5344. The matter of fraud was not involved therein. It is one thing to sue to determine that a note is paid and that the sale under a deed of trust therefor should be enjoined, and it is quite another thing to sue to determine that the deed of trust was procured by fraud. Here are two separate and distinct bases of action in no way related to each other.

Non constat but that a note may be perfectly valid and yet a deed of trust claimed to secure the same may be entirely fraudulent and void; and the fact that plaintiffs have not succeeded in establishing that a note was paid in the prior Action No. 5344, in no way should affect or bar their right to proceed in an action to avoid a deed of trust and sale thereunder. *The attack in the two cases is against different instruments and obligations.* There has never been at any time any adjudication upon the question whether or not the deed of trust for the note of two thousand four hundred forty-five dollars was fraudulently obtained.

ERRORS IN LAW.

It seems, on page twelve of the opinion hereinbefore filed, that the Court recognizes that the cause of action herein is different from the cause of action adjudicated in Action No. 5344, but nowhere in its opinion does the Court give the full effect arising in law from *difference in cause of action* upon the question of *res adjudicata.* The conclusion that the cause of action herein is different, immediately places the case at bar in the second class of those mentioned in the case of *Cromwell v. Sacramento,* 94 U. S. 51 at 352, quoted at the top of page seven of the opinion herein as follows:

> "In considering the operation of this judgment, it should be borne in mind as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as estoppel in another action between the same parties upon a different claim, or cause of action. In the former case, the judgment, if rendered on the merits, constitutes an absolute bar to a subsequent action. * * * But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted."

Considering this distinction, and having in mind that the cause of action herein is not the same as that set forth in case No. 5344, the decision in case No. 5344 is not an absolute bar to the action herein,

but is only a bar as to identical facts in issue. And the question of fraudulent procurement of the trust deed was not in issue in the earlier action.

> "Altho a judgment may be conclusive evidence on any point litigated and decided between the same parties, yet it is not pleadable in bar of a second action, unless it is founded on the same identical, or substantially identical cause of action." 34 C. J. 802.
>
> "As the suit in the Michigan Court was not upon the identical cause of action litigated in the United States Circuit Court, the estoppel operates only as to matters in issue, or points controverted and actually decided in that suit."
>
> *Radford v. Myers,* 231 U. S. 725, 730.
>
> "Where a second suit is upon the same cause of action set up in the first suit, an estoppel by judgment arises in respect to every matter offered or received in evidence, or which may have been offered to sustain or defeat the claim in controversy; but where the second suit is upon a different claim or demand, the prior judgment operates as an estoppel only as to matters in issue or points controverted and actually determined in the original suit."
>
> *Troxell v. Delaware, Lackawanna Railway Company,* 227 U. S. 434, 440.

Since the cause of action herein and the cause of action in the prior case No. 5344 are different, the quotation in the opinion of the Court, page 9, from *Davis v. Brown,* 94 U. S. 423, 428, is not applicable. The rule is when the causes of action are not the same, then the prior action *is a bar only as to what was actually adjudicated and not as to what might have been adjudicated.*

> "On the other hand where the causes of action involved in the two actions are different, the judgment cannot operate as a bar, even tho it may defeat the second action, because it conclusively and negatively adjudicates some fact essential to maintain the latter. *Under such circumstances the estoppel does not extend to matters which might have been litigated in the first action,* but is limited to those matters or issues common to both actions which were either expressly or by necessary implication adjudicated in the first." (*Freeman on Judgments,* Fifth Edition, Section 677, page 1429 (italics ours).

And in view of this principle, it is submitted that the Court herein is in error in its opinion on page nine, in holding that the former case is a bar by facts determined therein, or *which "might have been brought forward and determined".* The principle "might have been brought forward and determined" *applies only to a situation wherein the causes of action are identical,* and has no application to the case at bar.

That the evidence in the former case did not establish an agreement upon the part of McColgan to purchase said property for the benefit of Lineker, and did not establish an agreement by McColgan to account for the proceeds of the sale under the first trust deed, is not an adjudication that these matters did not, or would not, establish fraud on the part of McGolgan in the transaction which would avoid the second deed of trust here in controversy.

CONCLUSION.

The transaction wherein plaintiffs lost their property was a stench in the nostrils of the late Honorable Wm. C. Van Fleet. It was characterized by him as "little less than downright robbery". There seems no doubt that plaintiffs did in fact lose their property by unsurpassed trickery of the notorious McColgans.

In the prior Action No. 5344, plaintiff failed in his attempt to establish an express contract on the part of McColgans to account for the fourteen thousand dollars ($14,000) received on sale under the first deed of trust; and plaintiff also failed to establish an express agreement of McColgan to purchase the property for his benefit, but the fact that the evidence failed to establish such express agreement, is not an adjudication and does not determine fraud on the part of the McColgans sufficient to avoid the second deed of trust, which is the subject of this action; and that there has been an adjudication that the note for two thousand four hundred forty-five dollars ($2445.00) was in settlement of accounts between plaintiff and McColgans, is not an adjudication that the deed of trust, an entirely separate and distinct instrument, was valid and enforceable. The note may have been good and the deed of trust invalid and void.

Your petitioners are about to be cheated of the fruits of a lifetime of effort by chicanery and treachery, and respectfully urge this Honorable

Court to grant them an opportunity to be fully heard in the District Court.

Plaintiffs earnestly seek the assistance of the long arm of equity in untangling the warp and woof of fraud whereby they have lost their property. Accordingly, they pray that a rehearing be granted herein and that thereupon the decree of the District Court sustaining the technical plea of *res adjudicata* be reversed and that a trial be ordered upon the merits.

Dated, San Francisco,
September 1, 1925.

Respectfully submitted,
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Attorneys for Appellants and Petitioners.

CORMAC, BOLLES & SURR,
GOLDMAN, NYE & SPICER,
Of Counsel.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellants and petitioners in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
September 1, 1925.

DOUGLAS A. NYE,
Of Counsel for Appellants and Petitioners.